ball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods."

6. Pursuant to the provisions of said Section 609 of the Revenue Act of 1932 and the regulations issued thereunder, The Viking Manufacturing Company, Inc. duly filed with the defendant its returns of gross monthly sales of the jig saw puzzles manufactured by it covering the period from June 21, 1932 to May 1, 1933, and duly paid thereon to the defendant the total sum of $37,021.63 on the following dates and in the following amounts:

Date.	Amount.
January 30, 1933	$3,075.13
February 16, 1933	259.40
February 27, 1933	6,826.05
March 31, 1933	10,519.50
May 1, 1933	16,341.55
Total	$37,021.63

7. Plaintiff alleges—

FIRST. That the jig saw puzzles manufactured by The Viking Manufacturing Company, Inc. were not "sporting goods" or "games" within the meaning of Section 609 of the Revenue Act of 1932 and were therefore not subject to tax under that section.

SECOND. That the articles manufactured by it were children's toys or games expressly exempt from taxation under the provisions of said section.

THIRD. That the regulation or ruling of the Commissioner of Internal Revenue exempting from taxation under Section 609 of the Revenue Act of 1932 only such jig saw puzzles as contained fifty (50) pieces or less is arbitrary, unreasonable and discriminatory in its application to The Viking Manufacturing Company, Inc. and all

other manufacturers of jig saw puzzles containing in excess of 50 pieces and that said regulation or ruling constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States.

FOURTH. That Article 11 of Regulations 46 relating to excise taxes on sales by the manufacturer under Sections 602 to 611, inclusive, 613 and 614 of the Revenue Act of 1932, in providing for a presumption that where no separate charge is made as a tax it will be presumed that the tax is included in the price charged for the article, adopts a presumption which is arbitrary, unreasonable and confiscatory, and violates the Fifth Amendment to the Constitution of the United States.

8. Plaintiff further alleges that at no time did The Viking Manufacturing Company, Inc. include the tax in the price of the article (jig saw puzzles) with respect to which it was allegedly imposed under said Section 609 nor did it collect the amount of said tax from the vendee; that said taxes were actually paid by The Viking Manufacturing Company, Inc. and were not paid by any other firm, person, individual, corporation or association.

9. On or about March 16, 1935, the plaintiff duly filed with the Collector of Internal Revenue then in office a claim for refund of the said sum of $37,021.63, setting forth as grounds therefor, among others, the reasons alleged in paragraphs 7 and 8 hereof, which claim for refund was disallowed and rejected by the Commissioner of Internal Revenue on May 27, 1935.

10. Plaintiff alleges that the said sum of $37,021.63 was erroneously, illegally and unlawfully collected from The Viking Manufacturing Company, Inc. by the defendant in violation of the Constitution of the United States and the statutes enacted thereunder.

11. The said sum of $37,021.63 has never been repaid to your plaintiff.

Wherefore the defendant owes the plaintiff the said sum of $37,021.63, together with interest at the rate of six (6) per centum per annum from the respective dates of payment as alleged.

COUNT. II. And the plaintiff says that the defendant owes him the sum of thirty-seven thousand twenty-one and 63/100 dollars ($37,-

021.63), together with interest from the respective dates of payment thereof as hereinbefore alleged, for money had and received by the defendant to the plaintiff's use.

Counts I and II are for the same cause of action.

PHILIP J. ARONSON,
Trustee in Bankruptcy of The Viking Manufacturing Company, Inc., by his Attorney,
SAMUEL GOTTLIEB.

At the same term, to wit, October 1, 1935, an answer was filed.

Also at the same term, to wit, November 25, 1935, the following Waiver of Jury Trial was filed:

WAIVER OF JURY TRIAL.
[Filed November 25, 1935.]

It is hereby agreed by the parties hereto that trial by jury is waived.

SAMUEL GOTTLIEB,
Attorney for the Plaintiff.

FRANCIS J. W. FORD,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorneys for the Defendant.

On the said twenty-fifth day of November, A. D. 1935, the following Defendant's Motion to Amend and Amended Answer was filed and allowed by the court:

DEFENDANT'S MOTION TO AMEND AND AMENDED ANSWER.
[Filed and Allowed November 25, 1935.]

Now comes the defendant in the above-entitled action and moves to amend his answer filed herein to read as follows:

1. The defendant admits the allegations set forth in paragraphs 1, 2, 3, 5, 6, 9 and 11 of count I of the plaintiff's declaration.

2. The defendant denies the allegations set forth in paragraphs 7, 8 and 10 of count I of the plaintiff's declaration.

3. The defendant admits the allegations set forth in paragraph 4 of count I of the plaintiff's declaration except the allegations that the sum of $37,021.63 was wrongfully and erroneously assessed against the plaintiff and illegally and unlawfully collected, which allegations the defendant denies.

4. The defendant denies each and every allegation set forth in count II of the plaintiff's declaration.

By his Attorneys,

FRANCIS J. W. FORD, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

Plaintiff assents to allowance of this motion.

By his Attorney,
SAMUEL GOTTLIEB.

This cause was thence continued to the December Term, A. D. 1935, when, to wit, December 31, 1935, said cause was set down for trial without a jury, the Honorable George C. Sweeney, District Judge, sitting.

On the said thirty-first day of December, A. D. 1935, the following Defendant's Motion for Judgment was filed:

DEFENDANT'S MOTION FOR JUDGMENT.
[Filed December 31, 1935.]

Now comes the defendant in the above-entitled action and on the pleadings and the evidence herein moves that judgment be entered for the defendant and against the plaintiff with costs.

By his Attorneys,

FRANCIS J. W. FORD, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

At the same term, to wit, January 14, 1936, the following Plaintiff's Motions were filed by leave of court:

PLAINTIFF'S MOTION FOR A SPECIAL FINDING OF THE FACTS.

[Filed by Leave of Court January 14, 1936.]

Now comes the plaintiff in the above-entitled cause and respectfully moves this court to make a special finding of the facts.

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

PLAINTIFF'S MOTION FOR JUDGMENT.

[Filed by Leave of Court January 14, 1936.]

Now comes the plaintiff in the above-entitled cause and respectfully moves this court to enter judgment for the plaintiff in the amount claimed in the declaration, together with interest and costs.

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

On the said fourteenth day of January, A. D. 1936, the following Defendant's Request for a Ruling of Law, Plaintiff's Requests for Rulings of Law, and Plaintiff's Request for Findings of Fact were submitted to the court:

DEFENDANT'S REQUEST FOR A RULING OF LAW.

[Submitted to the Court January 14, 1936.]

Now comes the defendant in the above-entitled action and requests the court to find as a matter of law that under Section 609 of the Revenue Act of 1932 (47 Stat. p. 264; 26 U. S. C. A. p. 430, 1935 Ed.) the Commissioner of Internal Revenue properly imposed an excise tax at the rate of ten percent (10%) on the jig saw puzzles

sold by The Viking Manufacturing Company, Inc. during the years in question.

By his Attorneys,

FRANCIS J. W. FORD, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

PLAINTIFF'S REQUESTS FOR RULING OF LAW.
PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

[MEMORANDUM. Copies of plaintiff's requests for rulings of law and plaintiff's requests for findings of fact will be found printed on pages 42–49 of this Transcript of Record as part of plaintiff's bill of exceptions. JAMES S. ALLEN, *Clerk.*]

At the same term, to wit, February 19, 1936, said cause came on for further hearing and it was ordered by the court that the plaintiff's motion for judgment be denied, plaintiff's exceptions being saved.

On the said nineteenth day of February, A. D. 1936, an opinion of the court was announced.

Also on said nineteenth day of February, it was ordered by the court that the defendant's request for a ruling of law be granted; plaintiff's requests for rulings of law be allowed in so far as they are consistent with opinion and denied in so far as they are inconsistent; plaintiff's requests for findings of fact allowed insofar as they are consistent with opinion and denied insofar as they are inconsistent, and judgment to be entered for the defendant.

This cause was thence continued to the present March Term, A. D. 1936, when, to wit, June 5, 1936, the following Stipulation Relative to Printing Certain Exhibits is filed:

STIPULATION RESPECTING THE PRINTING OF CERTAIN EXHIBITS.

[Filed June 5, 1936.]

It is hereby stipulated and agreed by and between the parties to the above-entitled cause as follows:

1. That Plaintiff's Exhibit 2 need not be printed in the record of

this cause, but may be transmitted to the United States Circuit Court of Appeals for the First Circuit as an original exhibit.

2. That Plaintiff's Exhibits 4 and 6 need not be printed in the record of this cause.

PHILIP J. ARONSON,
Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

THOMAS W. WHITE,
Individually and as former Collector of Internal
Revenue for the District of Massachusetts,
by FRANCIS J. W. FORD, *United States Attorney,*
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

On the said fifth day of June, A. D. 1936, a plaintiff's bill of exceptions is filed within extended time and allowed by the court.

On the twenty-second day of June, A. D. 1936, it is considered by the court on the finding of the court, the Honorable George C. Sweeney, District Judge, sitting, that the said Philip J. Aronson, Trustee in Bankruptcy of The Viking Manufacturing Company, Inc., plaintiff, take nothing by his said writ and that the said Thomas W. White, individually and as former Collector of Internal Revenue, defendant, recover of the said plaintiff his costs of suit taxed at

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OPINION.

February 19, 1936.

SWEENEY, J. This is an action at law brought by the plaintiff, as trustee in bankruptcy of The Viking Manufacturing Company, Inc., to recover taxes assessed against the company as a manufacturer's excise tax under the provisions of Section 609 of the Revenue Act of 1932.

The facts are as follows: The Viking Manufacturing Company, between June 21, 1932 and May 1, 1933, paid the following taxes:

"Date,	Amount.
January 30, 1933	$3,075.13
February 16, 1933	259.40
February 27, 1933	6,826.05
March 31, 1933	10,519.50
May 1, 1933	16,341.55
Total	$37.021.63"

being at the rate of 10 percent on the manufacture and sale of articles described as puzzles of the jig saw type. The puzzles contained between 162 and 500 pieces each.

The court finds as a matter of fact that the Viking Company did not pass the tax along to its vendees. The sole question remaining is whether the article manufactured by the Viking Company, namely, a puzzle of the jig saw type, and commonly referred to as a jig saw puzzle, was taxable under Section 609 of the Revenue Act of 1932, which provides that:

> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods."

Treasury Regulations 46, promulgated under the Revenue Act of 1932, and pertaining to Section 609, contains the following:

> "Art. 53. Scope of Tax.—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well

as to all similar articles commonly or commercially known as sporting goods, games, and parts of games (except playing cards and children's toys and games).

The term 'sporting goods' includes all articles of the same general character as those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport.

The term 'game' includes games of skill or chance and every contrivance, device, or combination or articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax."

The plaintiff contends that a puzzle of the jig saw type is not within the meaning of the word "game" as used in the statute, and supplies a great many argumentative reasons in support of his contention. Among the many definitions given by Webster's Dictionary there is one which describes a game as an "amusement or diversion". This interpretation of the word "game" was maintained in the case of *Mills Novelty Co.* v. *United States,* 50 Fed. (2d) 476, where the court stated:

> "The word 'game' is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement."

In the enactment of this legislation Congress had in mind a comprehensive and all-inclusive scheme of taxation which was intended to cover the articles set forth therein generally, giving the words of that Act a fair meaning. As stated in *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658:

> "The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life."

There is nowhere shown in the enactment an intent to except a

game or puzzle such as is here involved. Turning to the contemporary construction placed on this Act by the Commissioner of Internal Revenue, it will be seen that under Article 53 of Regulations 45, promulgated on June 18, 1932, a game was deemed to include "every contrivance . . . designed to furnish sport, recreation or amusement".

It is to be noted that the only exceptions set forth in the statute on the question of taxability are "playing cards and children's toys and games". The petitioner contends that it should be exempt as being a children's toy or game. The burden of proving that he is within the exceptions to the Act is on the plaintiff.

The Commissioner has ruled that, for the purpose of the Act, puzzles containing 50 pieces or less will be considered children's games, and not subject to the tax, X1-2 Cumulative Bulletin, 481: Regulations 46, Article 55: Games—Taxability of jig saw puzzle as a game:

> "Advice is requested concerning the taxability, under section 609 of the Revenue Act of 1932, of jig saw puzzles as games.
>
> The word 'games' as used in section 609 of the Revenue Act of 1932, does not mean the games themselves but the instrumentalities used in playing them. (See *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, T. D. 3401, C. B. I-2, 297.) Under the strict interpretation of that word all picture puzzles could be classified as games and held to be taxable. However, children's games are specifically exempted from the tax. It would follow that if the picture puzzles, or games, are of the type ordinarily designed for the use of children, they are not taxable.
>
> A jig saw puzzle containing comparatively few pieces may properly be considered as one so simple as to warrant classification as a children's game and exempt from the tax. Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults. For revenue purposes, it is held that if the jig saw puzzle contains 50 pieces or less, it is a children's game and not subject to the tax. If the jig saw puzzle contains more than 50

pieces it is subject to the tax as a game under section 609 of the Revenue Act of 1932."

The plaintiff has not sustained the burden of proving that jig saw puzzle comes within the exceptions as being a children's game, nor do I find that the Commissioner's ruling that games with less than 50 pieces are children's games is an arbitrary or unfair ruling. Obviously some line of demarcation had to be maintained, and this seems to be as fair as any.

The plaintiff's motion for judgment is denied. The defendant's request for a ruling of law is granted. The plaintiff's requests for rulings of law are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent. The plaintiff's requests for findings of fact are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent. Judgment may be entered for the defendant.

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed and Allowed June 5, 1936.]

This is an action brought by the plaintiff, as trustee in bankruptcy of The Viking Manufacturing Company, Inc., to recover the sum of $37,021.63, with interest, which was paid by The Viking Manufacturing Company, Inc. to the defendant as a manufacturer's excise tax under the provisions of Section 609 of the Revenue Act of 1932 on account of the sale by said company of picture puzzles of the jig saw type, described in the plaintiff's declaration as jig saw puzzles, during the period from June 21, 1932 to May 1, 1933.

The defendant on October 1, 1935, filed a general denial. In an amended answer filed on November 25, 1935, certain of the allegations in the plaintiff's declaration were admitted. All of the pleadings appear elsewhere in the record and are expressly incorporated in and made a part of this bill of exceptions by reference.

On Novmber 25, 1935, trial by a jury was waived by stipulation in writing and on December 31, 1935, the case was tried before Sweeney, J., sitting without jury, upon the two issues of fact raised by the pleadings, namely, (1) whether or not the picture puzzles manufactured by The Viking Manufacturing Company, Inc. were tax-

able as "games and parts of games" or "sporting goods" under Section 609 of the Revenue Act of 1932, or, as contended by the defendant, whether the Commissioner of Internal Revenue, under Section 609 of the Revenue Act of 1932, erred in assessing an excise tax on picture puzzles of the jig saw type, described in the declaration as "jig saw puzzles", which were manufactured and sold by The Viking Manufacturing Company, Inc. during the period of time in controversy, and (2) whether or not the taxes paid by The Viking Manufacturing Company, Inc. to the defendant were borne by the company or passed on to the ultimate consumer.

GEORGE S. PARKER was called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gottlieb as follows:

He lives in Salem, Massachusetts, and Peterborough, New Hampshire. His legal address is really Peterborough, New Hampshire. He is chairman of the board of Parker Brothers, manufacturers of games, kindergarten goods, picture puzzles and novelties. That describes the business of Parker Brothers; there are some other minor things they make but those are the principal four. He has been in that business 53 years. He has invented a great many games, puzzles or toys and has had a very great many patents issued to him.

His firm manufactures jig saw puzzles at the present time. Their first jig saw puzzles were made perhaps in 1908 and 1909 and picture puzzles of the jig saw type have been made by them continuously thereafter. These jig saw puzzles manufactured by his company have been sold to the trade generally throughout the United States; to dealers, wholesale and retail.

He is familiar with the terminology of the trade or business in which he is engaged. In the terminology of the trade the word "game" never includes either puzzles or toys.

Thereupon the witness testified, subject to the defendant's objection and exception, duly saved, that in his opinion a jig saw puzzle is not a game and never was. The witness then further testified as follows:

As a manufacturer of games and puzzles he would define the

word "game" as a contest between players or sides, as usually expressed, for the purpose of determining the winner and for the purpose of amusement. He thinks that describes a game accurately. Games ordinarily have a set of rules and he can think of no game which is not intended to have a victor and a loser. As a manufacturer of games and puzzles he would say that the term "puzzle" defines itself; that is exactly what it is; that is why the word is used; it applies commercially to that article. Picture puzzles of the jig saw type do not usually have a set of rules. He was shown articles purporting to be some of those which used to be manufactured by The Viking Manufacturing Company. The witness referred to the articles exhibited to him as "paper puzzles". The puzzles shown the witness (later introduced into evidence as Plaintiff's Exhibit 2) are the type of the Viking make. He would describe those puzzles as picture puzzles of the jig saw type.

He does not know when the jig saw puzzle or the dissected picture puzzle was first invented. There have been picture puzzles probably going back to the first part of the last century, perhaps to the Revolution with certain types.

Whether children are as adept as adults in solving jig saw puzzles all depends upon the child; many children are rather smarter than their parents in doing them. Children very frequently are very adept at it. It depends largely upon following the colors and shapes and children are ordinarily very smart at that. From his experience he would say that children frequently solve puzzles in excess of 50 pieces.

Thereupon the following questions were asked and the following colloquy occurred:

"*Q.* 1. From your knowledge and experience in the trade, would you say that a ruling that all jig saw puzzles having 50 pieces or less are children's games, and all jig saw puzzles having more than 50 pieces are adult games,—would you say that ruling is a reasonable one as a matter of fact?

Mr. SMITH. I object to that.

The COURT. Objection sustained.

Mr. GOTTLIEB. One of our contentions here is, if your Honor please, that the Commissioner made an arbitrary ruling.

The COURT. So I understand.

Mr. GOTTLIEB. And we know of no way to meet it—

The COURT. You have raised it, have you not? You have raised that question.

Mr. GOTTLIEB. But to meet it with evidence.

The COURT. You say this is an unjust tax because the discretion used by the Commissioner was arbitrary.

Mr. GOTTLIEB. We want to try to assist the court with evidence.

The COURT. You have introduced evidence, have you not, as to the degree of adaptability of persons to solving picture puzzles?

Mr. GOTTLIEB. I have.

The COURT. How much further is it necessary to go?

Mr. GOTTLIEB. May I save an exception to that ruling, if your Honor please?

The COURT. Yes.

Q. 2. Are you familiar with the provisions of Section 609 of the Revenue Act of 1932 which imposes a tax on games and parts of games, except children's toys and games? *A.* Yes.

Q. 3. When information first came to your knowledge of this tax under the Revenue Act of 1932, were you of the opinion that the word 'games' comprehended and included jig saw puzzles?

Mr. SMITH. I object to that, your Honor.

The COURT. Objection sustained.

Q. 4. Did you as a manufacturer of jig saw puzzles make any monthly reports as required by law—

Mr. SMITH. I object to that, your Honor.

The COURT. Sustained. You mean Parker Bros.?

Mr. GOTTLIEB. Parker Bros., —as showing—

The COURT. What they did has nothing to do with this suit.

Mr. GOTTLIEB. The interpretation given by him to that section of the law—that they did not treat jig saw puzzles as games.

The COURT. I will not receive that and save your exception if you want it.

Mr. GOTTLIEB. All right.

Q. 5. Do you remember when Parker Bros. first made its return to the Collector of Internal Revenue on jig saw puzzles as games?

Mr. SMITH. I object to it.

The COURT. I sustain it. Whatever Parker Bros. did has no bearing in this case whatsoever. This is what the Viking people did.

Mr. GOTTLIEB. Except for the fact of the terminoligy and the feeling of the trade.

The COURT. I do not care how the trade felt about it. It is going to be how this court feels about it that determines it.

Q. 6. Would you say that the difficulty of a jig saw puzzle depends solely on the number of pieces, or are there other factors? *A.* There are other factors. Ease is sometimes a matter of the color distribution and how the puzzle is cut, following the lines of color and so forth. For instance, two blue pieces fitting together very definitely belong together, if it is part of the blue sky. If it is so cut that the blue sky, the patch of blue is all that there is, it may be more difficult to fit in.

Q. 7. Did Parker Bros. manufacture cross word puzzles in 1932 and 1933?

Mr. SMITH. I object to that.

The COURT. Objection sustained. There is no issue here in connection with cross word puzzles, is there?

Mr. GOTTLIEB. Except this: the Government is going to rely on their ruling and at about the same time there is an unreported ruling that cross word puzzles are not taxable as games. I think there is a similarity between cross word puzzles and jig saw puzzles, and I think that the Government is going to rely on a regulation or ruling of the Commissioner made at about the same time.

The COURT. If you pursue that line of thought you can carry it down to any puzzle, like the well-known twisted nails.

Mr. GOTTLIEB. Except there is a similarity between cross word puzzles and jig saw puzzles.

The COURT. I see no similarity. Regarding puzzles generally, a person does a lot of things which you do not do, like getting the black ball in the nigger's eyes and that sort of thing—twisting the nails. I think they have no similarity, unless I am confused about it.

Q. 8. Did your concern manufacture jig saw puzzles during the years 1919, 1920 and 1921? *A.* Yes, sir.

Mr. SMITH (to Reporter). May I hear that question? [Question read.] I object.

The COURT. What is the purpose of it?

Mr. GOTTLIEB. There was a similar provision of the law during those three years, and during those three years jig saw puzzles were not taxed as games. The Commissioner may come along and say there is an established course of conduct by the Commissioner of Internal Revenue which had to be taken into consideration in determining whether a certain article is taxable.

The COURT. When did the ruling that you complain of go into effect?

Mr. GOTTLIEB. In November, 1932, about six months after this particular Revenue Law was passed.

The COURT. What was the status of jig saw puzzles before that, before 1932?

Mr. GOTTLIEB. There was no tax on games between December 31, 1921 and June 6, 1932. Games were subject to tax for three years, 1919, 1920 and 1921; then the law was repealed, and practically the same provision was restored to the law on June 6, 1932.

The COURT. I think I will take notice of it without having you give me any assistance on it.

Mr. GOTTLIEB. In that connection we intend to offer evidence that the Commissioner, previous to his ruling of November 6, some time in August, 1932, made the ruling that jig saw puzzles were not taxable as games. It was not a published ruling, and I want to pursue that line.

The COURT. I will allow that.

Mr. GOTTLIEB. Have you that ruling I asked you to produce?

Mr. SMITH. For Parker Bros.?

Mr. GOTTLIEB. Yes, for Parker Bros.; and one for cross word puzzles.

Mr. SMITH. I have a ruling, if your Honor please, on jig saw puzzles but directed to the Collector of Internal Revenue in New

York and applicable to an entirely different taxpayer from The Viking Manufacturing Company.

The COURT. But it refers to jig saw puzzles generally?

Mr. SMITH. It refers to a letter in which there is a reference to a catalog from this concern that made the puzzles.

The COURT. Jig saw puzzles.

Mr. SMITH. Jig saw puzzles.

The COURT. I think it is admissible.

Mr. SMITH. That has since been revoked.

The COURT. You may show the revocation but I will allow the ruling.

Mr. SMITH. May I have an exception to that?

The COURT. You may."

Thereupon, a letter addressed to the Collector of Internal Revenue, Brooklyn, New York, and dated August 26, 1932, was introduced into evidence and marked "Plaintiff's Exhibit 1". Said letter was then read into the record and reads as follows:

PLAINTIFF'S EXHIBIT 1.

C. S. Hammond & Co., Inc.

MT:ST:MR Aug. 26 1932

Collector of Internal Revenue, Brooklyn, New York.

Attention: MT:FEC:KJ

Reference is made to your letter of August 12, 1932, in which there was enclosed a catalogue received by your office from C. S. Hammond & Co., Inc., of Brooklyn, New York, in which there were illustrated various puzzles manufactured by this company. You request information as to whether these puzzles are subject to the tax imposed by section 609 of the Revenue Act of 1932.

You are advised that the various puzzles illustrated in the catalogue received from the above company are not taxable as games under section 609 of the Revenue Act of 1932.

R. M. ESTES, Deputy Commissioner.

FS–MHD cc–Capt. Bliss cc–Mr. Dunsmore

[Written on margin:]
ruling reversed 2/7/33

The following colloquy then occurred:

"The COURT. Are you going to introduce anything to show whether that letter as produced referred to 50-piece puzzles or more?

Mr. GOTTLIEB. No, I have no evidence of that, other than the general ruling that jig saw puzzles—The 50-piece ruling was not made until November, 1932. I have this general ruling that jig saw puzzles were not taxable.

The COURT. I will take it for what it is worth."

Thereupon the following questions were asked and the following rulings made, to which the plaintiff's exceptions were duly saved:

"*Q.* 9. Did your company pay any taxes—

Mr. SMITH. I object to that, your Honor.

The COURT. Sustained.

Mr. GOTTLIEB. Save my exception. I had not finished the question.

Q. 10. Did your company pay any taxes on jig saw puzzles as games during the years 1919, 1920 and 1921? *A.* No.

Mr. SMITH. I object to that.

The COURT (to Witness). Just hold your answers, Mr. Witness, until the court has ruled on the objection. The objection is sustained. The answer may be stricken.

Mr. GOTTLIEB. May we have an exception to that?

The COURT. You may.

Q. 11. Do you know whether the trade generally paid any tax during 1919, 1920 and 1921 on jig saw puzzles?

Mr. SMITH. I object to that.

The COURT. Objection sustained.

Mr. GOTTLIEB. Exception to your Honor's ruling.

The COURT. You may have an exception to that ruling."

On *cross-examination* the witness testified as follows:

He says that it takes more than one to play a game. He has never seen a game with one person, outdoors or indoors.

Thereupon the following question was asked and the following colloquy occurred:

"X-*Q.* 12. How many play a ouija board? *A.* A ouija board isn't a game.

Mr. GOROVITZ. I object to that.

A. (continued). It is a device—

Mr. GOROVITZ. Just a minute.

A. (continued). I tell you what it is—

Mr. GOROVITZ. Mr. Parker, will you just hold your answer until the court has ruled on my objection?

The COURT. What is your objection?

Mr. GOROVITZ. If we cannot go into the question of cross word puzzles, I do not think that the Government has right to go into the question of ouija boards.

The COURT. There is no analogy there. This witness has testified that every game took two or more persons to play, and I will allow the question.

Mr. GOROVITZ. May we have an exception?

The COURT. You may.

Mr. SMITH (to Reporter). Will you read the question?

[The last question is read.]

The COURT. How many players does the ouija board have?

The WITNESS. I would not say. It is ordinarily, I think, used by one person. But it is not a game."

The witness further testified that he does not consider a penny-in-the-slot machine or a nickel-in-the-slot machine a game; it is a gambling device but not a game.

Thereupon the following questions were asked by the court and the following answers given:

"The COURT. Mr. Witness, how about these contraptions where you shoot a ball from a spring and try to shoot it into a hole? Do you call that a game?

The WITNESS. That is a device. Commercially, I would say not. I would say it was a game if there was a contest between players.

The COURT. Is it not a game of skill if one person plays it?

The WITNESS. Oh, no, I should not say it is a game.

The COURT. What is it?

The WITNESS. It is an exercise, amusement. It is an amusement, an exercise, quite different from a game. A game is a contest.

The COURT. That is all.

The WITNESS. I don't know of any game which is not a contest, indoors or outdoors.

The COURT. That is all."

Thereupon FORREST R. COOK was called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gorovitz as follows:

He lives at 6 Lindley Road, Clifton. He is a buyer employed by William Filene's Sons Company, Boston, in charge of the toy department. He has been buyer of the toy department for six years during which period he was in charge of the purchases of games, toys and puzzles for that store. During the past six years he purchased jig saw puzzles or puzzles of the jig saw type for William Filene's Sons Company. Those jig saw puzzles were not sold in the toy department exclusively. They were also placed on sale in the stationery department.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. Now, Mr. Cook, from your experience in the trade would you say that a puzzle or a jig saw puzzle is a game? *A.* No, sir.

Mr. SMITH. I object to that, your Honor. He has not qualified as an expert on what is a game.

Mr. SMITH. May I have an exception?

The COURT. You may have an exception.

Q. 2. What is your answer? *A.* I did not answer. No, it is not a game."

The witness further testified that from his experience as a buyer of toys, games and puzzles and from his knowledge of the terminology of the trade he would define a game as being a contest between two or more people where they play by a set of rules, one hoping to win and the other expecting to lose. Upon interrogation by the court the witness then testified that it would be a natural consequence for one to lose; that the man who would eventually lose would naturally hope to be the winner; that they would both hope to win.

Upon interrogation by plaintiff's counsel the witness then testified that a puzzle or a jig saw puzzle is not a game.

In answer to questions by the court the witness further testified as follows: A puzzle would be more of a problem to be solved. He would classify one of those boards where you shoot a ball and try to see how much of a score you can make as a form of scoring. If two people played it it would be a game, provided there would be a score to make and one could win. That is, having in mind the board, where there is one hole up to 1000 and another 500, but leaving the gambling element out, if two players played it it would be a game.

"The COURT. If one man played it by his lonesome to see how much of a score he could make, you would not call it a game?

The WITNESS. If he played without a set of rules it would come under the classification—

The COURT. The rules are 10 shots to see how much of a shot you can make, and the rest is all skill, the amount of acceleration you apply to the ball.

The WITNESS. With the element of skill and chance in it, it might be called a game.

The COURT. That is all."

Thereupon the witness further testified that toys, games and puzzles are each in a separate and distinct category from the view-point of the trade.

On *cross-examination* the following questions were asked and the following colloquy occurred:

X-Q. 3. Mr. Cook, do you consider the ouija board a game? *A.* No, sir, I do not think it is.

Mr. GOROVITZ. I object to that question, your Honor.

The COURT. I admit it and save your exception.

X-Q. 4. Do you consider a penny or nickel-in-the-slot machine a game?

Mr. GOROVITZ. May I have an exception to that too?

The COURT. You may have it.

Mr. SMITH. He has not answered that yet.

A. I do not think it is a game; no, sir.

Mr. SMITH. That is all."

Thereupon LINWOOD C. CHASE was called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gottlieb as follows:

He lives at 15 Lincoln Road, Wellesley Hills. He was connected with The Viking Manufacturing Company during 1932 and 1933 as treasurer. The Viking Manufacturing Company was organized in 1930. It began to manufacture jig saw puzzles in September or October of 1932. It did not manufacture games or toys in 1932 or at any other time.

Thereupon the witness was handed seven boxes, five of them entitled "Picture Weekly", one entitled "De Luxe Puzzle" and one entitled "Ed Wynn Picture Puzzle", and stated that they were manufactured by The Viking Manufacturing Company during 1932 and 1933. The witness does not recall any puzzles other than these puzzles that were manufactured by the Viking Company in 1932 and 1933. These picture puzzles of the jig saw type were manufactured by his company as follows: Various pictures were selected and backed up by a heavier cardboard and then die cut by steel dies on a power press. In the case of the picture puzzle weekly, his firm always had a different picture each week.

Thereupon seven boxes of puzzles and four pictures were introduced into evidence and marked as "Plaintiff's Exhibit 2".

The witness further testified that The Viking Manufacturing Company ceased to manufacture jig saw puzzles about the time of the bank holiday in 1933, shortly after that; that the manufacturing period lasted for about seven or eight months.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. In your opinion, is a jig saw puzzle a game? *A.* No, sir.

Mr. SMITH. I object to that, your Honor.

The COURT. I will allow it.

Mr. SMITH. May I have an exception to that?

The COURT. Yes."

The witness then testified as follows: He says it is not a game because a game, as he interprets it, must be played in the spirit of competition between two or more persons under definite rules of

competition. There are no rules to determine a puzzle solution. Rules are necessary in connection with a game. A game, as he interprets it, must be one of actual competition between two or more persons with certain definite rules of competition. It is a competition of skill or strength or various other things.

He can only judge whether children are as adept as adults in solving puzzles from the children that he has had experience with, and in that case the children were more adept than the adults in his own family and the families of his friends. He would say that children can solve puzzles in excess of 50 pieces.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 2. Now, taking the particular puzzles manufactured by your company, were they particularly designed for any particular class of people?

Mr. SMITH. I object to that, your Honor. They speak for themselves.

The COURT. What is the objection? If I understand the question, were they designed for any particular class of people?

Mr. SMITH. Yes.

The COURT. What is your objection to that?

Mr. SMITH. They speak for themselves.

The COURT. Well, the absence of an intent here may or may not be important. I allow it and save your exception.

A. Our thought was primarily to make them to appeal to children, as evidenced by the fact there are many pieces in these puzzles cut into shapes resembling animals, silhouettes and various figures, and in offering the Ed Wynn puzzles a great many of those subjects chosen were of the type to appeal to children, that is, they were comical or educational.

The COURT. Can you say, Mr. Witness, that you limited yourself to children in designing these puzzles?

The WITNESS. No, your Honor.

The COURT. You made them generally for whoever would buy them, did you not?

The WITNESS. Surely."

The witness then testified as follows: He thinks the fact that they made those animal shapes and various silhouettes is evidence that they were designed to appeal to children and to attract them. He would say that the Ed Wynn puzzles were wholly comical.

They made no return to the Federal Government on jig saw puzzles as games during the month of October or November in 1932; they did not know of any tax on jig saw puzzles. They did not know of any tax on jig saw puzzles of this type. He does not call them jig saw puzzles. He calls them picture puzzles of the jig saw type.

There is a distinct difference between puzzles cut by a jig saw and these die cut puzzles. There is a distinct difference between the real jig saw puzzle which is cut from pieces of wood by a jig saw and these die cut puzzles which are cut by dies from pieces of cardboard, a distinct difference in manufacture and in the product.

These jig saw puzzles contained pieces varying from 162 up to 500 pieces, with some at 200 or 300 or 400 pieces. They varied all the way. The company was guided in that regard by the requirements of the purchasing public. The 162-piece was too easy for the children even. It is correct to say that the puzzles manufactured by his company contained a minimum of 162 pieces and a maximum of 500.

He first learned as treasurer of the Viking Company of a Federal tax on jig saw puzzles as games late in December of 1932. He learned of it in a talk with Mr. Pfau of the local income tax office, who advised them it would be necessary to file a return, and he had at about the same time noticed some articles in the local papers along the same line.

The bulk of their puzzles was sold to individuals all over the United States through the distribution agency of the American News Company. They had a contract by which they were the sole distributors of the company's puzzles. At least 99 percent of the output of picture puzzles was sold through the American News Company under two written contracts.

Thereupon the witness was handed two contracts, one dated November 17, 1932, and the other one dated December 13, 1932,

and identified them as copies of two contracts between his company and the American News Company for the distribution of their product of picture puzzles. The one dated November 17, 1932, is one of two original copies and the letter dated December 13, 1932, which is unsigned, is their copy of the second contract, the copy of the letter which he had previously signed himself. These contracts were then introduced into evidence and marked as "Plaintiff's Exhibit 3".

The witness further testified as follows: When his company made these contracts with the American News Company, Inc. they did not know of any tax on jig saw puzzles as games. Under their contract with the American News Company, Inc. the price they received for the Weekly puzzle from the American News Company after sale had been consummated was 12½ cents, they going to the public at 25 cents a copy. Under their contract they were to charge the American News Company 12½ cents for the Weekly puzzle and the Viking Company paid the freight. Under this extension agreement of December 13, 1932, the price of the Ed Wynn puzzle was 17½ cents and 35 cents to the purchasers. On the De Luxe puzzle the price was 25 cents and 50 cents to the purchaser. At the time these agreements were signed by the American News Company, the Viking Company was ignorant of any tax on jig saw puzzles as games. After December 29, 1932, when they first learned that the Government claimed that jig saw puzzles were games, they made no change in those contracts or in the price. They told the American News Company of this Government tax at the time but they did not attempt to make any change in their agreement with the American News Company. His company thereafter paid the 10 percent tax on the price which they received on the sale of these various puzzles, that is, on the 12½ cents, the 17½ cents and the 25 cents. His company never included the tax in the sale price to the American News Company. It never collected any of these taxes from the American News Company or from anyone. It never passed on the tax on the puzzles to the American News Company or to any purchaser.

ROYCE W. GILBERT was thereupon called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gottlieb as follows:

He lives at 166 Fisher Avenue, Brookline. During 1932 and 1933 he was president of The Viking Manufacturing Company. In September and October of 1932 his company entered upon the manufacture of jig saw puzzles. It ceased to manufacture jig saw puzzles in the spring of 1933. The puzzles which have been introduced in evidence fairly describe and indicate the kind of puzzles which were manufactured by his company, the Weekly, De Luxe and the Ed Wynn puzzles.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. In your opinion, is a jig saw puzzle a game? *A.* It is not.

Mr. SMITH. I object to that. He has not qualified as an expert on games, it seems to me.

The COURT. Well, I do not think he has either, but I will let him testify as to his opinion for what it is worth.

Mr. SMITH. Save my exception."

The witness further testified as follows: He says that a jig saw puzzle is not a game because it is a puzzle; there is a distinction between a puzzle and a game. He remembers at one time writing a paper on jig saw puzzles which he did not publish. He found they had a very interesting history, that picture puzzles had been perhaps one of the earliest forms of puzzles. They had been made for literally thousands of years. He thought it has remained for the United States Government to confuse the difference between a puzzle and a game. In all his history or research he never found any reference to a puzzle as a game. There always has been a distinct line between puzzles and games.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 2. Do you recall what books you read, for the moment, in connection with the study? *A.* I found references to picture puzzles under the original—they were originally called Chinese puzzles

because the Chinese made them at an early date and introduced them into Europe before the discovery of America.

The COURT. Will you answer the question giving the names of the books you consulted in making your study?

Q. 3. Where did you find the reference?

The WITNESS. I can't, your Honor, recall the exact references.

The COURT. You can't recall any of the authorities?

The WITNESS. I found references to picture puzzles at the library, in books on, given up to puzzles and games, toys and devices for amusement.

The COURT. But you do not remember the names of any of the books?

The WITNESS. I do not."

The witness then testified that in his opinion children were not as adept as adults in solving puzzles in general but he thinks they are in picture puzzles. His observation has been that children can solve any of the Viking puzzles fully as quickly as the adults.

Thereupon the following colloquy occurred:

"The COURT. How much observation of that nature have you made, *Mr. Gilbert?*

The WITNESS. Why, only the time of the so-called picture puzzle craze when it was at its height; all of our neighbors and friends met together, and I usually, naturally, noticed.

The COURT. What was the point? Did sombody say they did so many a minute or so many an hour, or what?

The WITNESS. We had thousands who wrote in on the making of the puzzle, the people who wrote in to tell how long it took them to make them.

The COURT. They would specify their accomplishments, the time it took them to put these pieces together?

The WITNESS. Yes.

The COURT. So that a child playing the game would say, 'I took 17 minutes', and the parent would say, 'I took 21 minutes'?

The WITNESS. Yes.

The COURT. That is how you drew your conclusion?

The WITNESS. That is part of the observation, and actually watching children in my home and elsewhere.

The COURT. Did you ever watch them, any person or any child of yours or your children together, to see who could do it in the quickest time?

The WITNESS. No, I don't know that I have.

The COURT. Do you know if such things happened?

The WITNESS. Why, I imagine it is logical.

The COURT. That would make it a game, would it not, if two or more persons were trying to see who could do it in the fastest time?

The WITNESS. No, because they could not compete simultaneously.

The COURT. Do you have to compete simultaneously in a game? In a game of baseball you do not. One side is batting while the other is in the field.

The WITNESS. They are both playing the game.

The COURT. That is true. They might be playing a game if they were sitting around a table watching it. Is that the only reaosn you say it is not a game?

The WITNESS. No. I think primarily a game is based on two things. There must be competition and there must be definite rules.

The COURT. There are no rules to cross-word puzzles, are there?

The WITNESS. No.

The COURT. It is just a question of seeing who can do it the fastest.

The WITNESS. I am not an expert on cross-word puzzles.

The COURT. On jig saw puzzles?

The WITNESS. The only competition there could be on the jig saw would be the relative time required by one to put them together but there are no rules. Everyone goes at it by their own methods.

The COURT. You think that rules are essential to the definition of it as a game?

The WITNESS. It seems to me so.

The COURT. If the thing does not have rules it is not a game?

The WITNESS. I have never been able to think of anything I classified as a game that did not have rules."

The witness further testified as follows: He would not say that the difficulty of the jig saw puzzle depends solely on the number of pieces. There are many other factors that would enter into it, that is, size of pieces, shape of cuts.

He was familiar with the contracts made by The Viking Manufacturing Company, dated November 17, 1932 and December 13, 1932, with the American News Company to distribute their entire product. At the time these contracts were made they had no knowledge that jig saw puzzles were subject to a 10 percent tax under the law as games. Under their contract with the American News Company their prices for the puzzles which were produced and manufactured by their company were 12½ cents for the Weekly, 17½ cents for the Ed Wynn and 25 cents for the De Luxe puzzle, minus freight. That is what their contract provided.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 4. Do you know when the Viking Company first learned that the Government claimed a tax on jig saw puzzles as games?

The COURT. The Viking?

Mr. GOTTLIEB. The Viking Manufacturing Company.

The COURT. Is that a corporation?

Mr. GOTTLIEB. Yes.

The COURT. How could it learn anything?

Mr. GOTTLIEB. Through its officers.

The COURT. What officers are you talking about?

Q. 5. Do you know when you first learned, as president of The Viking Manufacturing Company, that the Government claimed a tax on jig saw puzzles as games? *A.* I learned of it the last of December, 1932."

The witness further testified as follows: Thereafter the company paid under protest the tax on jig saw puzzles as games in view of the demand of the Collector of Internal Revenue. Over 99 percent of their output was sold through the American News Company, Inc. After they learned, on or about December 29, 1932, that the Collector of Internal Revenue claimed a tax on jig saw puzzles as games they discussed the tax with the American News Company, Inc. at

the time but they had no result. They never included the tax in the price and never passed it along to or collected it from the American News Company. The taxes which were paid here were paid by The Viking Manufacturing Company.

Thereupon the following questions were asked and the following colloquy occurred:

"*Q.* 6. Do you know who signed the return for these excise taxes paid by the company? *A.* I do not offhand.

Q. 7. Do you know whether you signed them or Mr. Chase? *A.* I do not remember, but my impression is the return had to be signed by both the president and the treasurer of the corporation, so I presume we both signed them.

Mr. GOTTLIEB. I offer them.

Mr. SMITH. We will agree that these are copies of the returns which you have filed. I do not see what the check has to do with it.

Mr. GOTTLIEB. I desire, your Honor, to offer them at this time, four of the monthly returns made by The Viking Manufacturing Company, Inc., in connection with reporting the monthly taxes due on these jig saw puzzles on the claim of the Government that they were taxable as games. Is there any objection?

Mr. SMITH. No.

Mr. GOTTLIEB. They appear to be signed, if your Honor please, just 'Viking Manufacturing Company, 31 St. James Avenue, Boston, Mass.' and cover four of the items set forth in the declaration, namely, $2,682.67, $6,826.05, $10,519.50 and $16,341.55."

Thereupon the four monthly returns were introduced into evidence and marked as "Plaintiff's Exhibit 4".

A. HOMER HATHAWAY was then called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gorovitz as follows:

He lives in Wollaston, Mass. He is employed by Chase & Gilbert as an accountant. During the years 1932 and 1933 he was connected with The Viking Manufacturing Company in the capacity of accountant and was in charge of their books and records. He prepared the monthly returns of excise taxes in connection with the manufacture

and sale of these various puzzles. The following procedure was adopted with respect to billing the American News Company for the shipments of these puzzles: The Boston office was advised by a shipping notice of the quantity of puzzles shipped to the American News Company and on receipt of the shipping notice the bill was shipped to the American News Company giving the quantity, the number of the puzzle, the cartons, the price, the amount and the type of puzzle. In billing the American News Company they did not state on the invoice the amount of the tax and there was no reference to the tax.

Thereupon the following colloquy occurred:

"The COURT. You need no further evidence that the tax was not passed along. You have sufficient in there now.

Mr. GOROVITZ. What is that, your Honor?

The COURT. I say, you need no further evidence that the tax was not passed along.

Mr. GOROVITZ. We feel, your Honor, that the mere method of billing is not conclusive, in the light of several decisions which have been handed down by the United States Supreme Court; and, the burden of proof being what it is, we feel that every bit of evidence that we can introduce respecting the manner of treatment of this tax by the company is also important.

The COURT. You are not going to ask me to pass on it?

Mr. GOROVITZ. No, your Honor, but we thought that we ought to show samples of invoices and manner of billing.

The COURT. For what purpose? To convince the court of something of which it is already convinced?

Mr. GOROVITZ. No, your Honor. I will withdraw it.

The COURT. All right, go ahead.

Mr. GOROVITZ. That being the case, your Honor, I think we do not need any more evidence on this question of the tax having been passed on, and I will discontinue with this witness.

Mr. SMITH. I have no questions."

DAVID ADAMS was then called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gorovitz as follows:

He lives in Belmont and is manager of the Curtis Publishing Company. During the years 1932 and 1933 he was in the business of manufacturing jig saw puzzles. He was connected with the University Distributing Company, who were manufacturers of picture puzzles of the jig saw type. He had a stock interest in the company and at one time was an official of the company holding office as president.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. Well, now, Mr. Adams, in your opinion is a jig saw puzzle a game? *A.* No, sir.

Mr. SMITH. I object to that, if your Honor please.

The COURT. What is his qualification, briefly?

Mr. GOROVITZ. He is a manufacturer of jig saw puzzles.

The COURT. When did he say he was president of this concern?"

The witness thereupon testified that he was president of the University Distributing Company when it was first incorporated in 1932 and subsequently he held the office of treasurer. He was connected with the University Distributing Company from 1932 on and is still connected with that company.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 2. Well, now, Mr. Adams, is a picture puzzle of the jig saw type a game, in your opinion?

Mr. SMITH. I object to that, your Honor.

A. No, sir.

The COURT. I will allow it and save your exception."

The witness then testified that from his experience as a manufacturer of jig saw puzzles he would say that a jig saw puzzle, in his opinion, is similar to a cross-word puzzle. It is a puzzle. A game is a variable outcome. A game is one that requires two or more to play it. A jig saw puzzle is a puzzle in the true sense of the word.

It is not a game. We call politics a game. We call most anything a game. A game is used in a lot of cases where it really isn't meant to be used.

He would say that the difficulty of a picture puzzle of the jig saw type does not solely depend on the number of pieces contained in the puzzle. The difficulty of a puzzle of this type might be dependent upon other factors in so far as the coloring of the picture is concerned, or the size of the pieces, but the size and number of the pieces is just a matter of continuation. It makes the puzzle just like a book. A long book takes a longer time to read than a short one. He would say that the manner of cutting up the picture, the nature of the shape of the individual pieces, is also a factor in determining the difficulty of a puzzle.

Thereupon the following questions were asked by the court and by counsel and the following answers given:

"The COURT. So that, Mr. Witness, if you restricted this to 50 pieces or below, you could still make a game by using colors or varied sizes and shapes more difficult than a game over 50?

The WITNESS. By restricting it to 50 and by using colors and pieces of variable sizes you can make it more difficult than one over 50?

The COURT. Which did not have the colors?

The WITNESS. Yes, very easily.

Q. 3 (Mr. Gorovitz). Would you say that children are as adept as adults in solving puzzles of the jig saw type?

The COURT. What experience has he had in determining that, first.

Q. 4. First, have you observed at all children and adults working out these puzzles? *A.* My own children, I have.

Q. 5. Have you seen them working out these puzzles? *A.* Why, I have.

The COURT. The same puzzle?

The WITNESS. Yes, the same puzzle. Just last night my boy was working on a puzzle, and the two children were working on it; they were putting them together better than I could. They are more adept at it than I am.

The COURT. They were working under similar conditions at about the same time?

The WITNESS. Gathered around the table.

The COURT. One would try it and the other would try it?

The WITNESS. Oh, no; they would work all together; just a combination, just a puzzle, putting it together.

The COURT. They were all working together?

The WITNESS. Oh, yes.

Mr. GOROVITZ. I think that is all.

Mr. SMITH. No questions."

Thereupon the following offer was made by counsel for the plaintiff and the following colloquy occurred:

"Mr. GOTTLIEB. If your Honor please, I should like to offer at this time in evidence Regulations 47, which was revised December, 1920, relating to the excise taxes on sales by the manufacturer under Section 900 of the Revenue Act of 1918. Section 900, sub-section 5 thereof, is the law which was practically identical with the provisions of the present law.

Mr. SMITH. I object to that, your Honor. We are considering now the 1932 statute.

The COURT. Is it the same in all respects?

Mr. GOTTLIEB. *Practically. I am quite certain* it is the same. I have not read it recently. It is offered for two purposes: First, because it is under the title of Sporting Goods, and the Commissioner at that time issued a regulation in which he as much as intimated that the word 'games' included games more nearly connected with sports; and, while I offered evidence before as to whether or not we paid any tax in 1919, 1920 and 1921, when jig saw puzzles were exempt under that statute, and your Honor excluded it and said you would take judicial notice of the fact, it has just been called to my attention that there is a line of decisions which hold that where a Federal statute has been given a definite interpretation for a period of years, upon a reenactment of the statute by Congress it is probable that Congress intended reenactment of the regulations controlling administrative practice.

The COURT. If you can show that that particular statute is identi-

cal with this present statute, I will admit it. If there is the slightest change, I will not admit it.

Mr. GOTTLIEB. May we have two minutes to compare it now?

The COURT. Yes.

[Counsel make comparison.]

Mr. SMITH. It is not exactly the same, your Honor.

Mr. GOTTLIEB. The material part for our case is 'games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, ten per centum"—I say that is absolutely identical.

The COURT. What is the difference in the two statutes?

Mr. GOTTLIEB. They eliminate one or two words of description —'Tennis racket frames, strings, rubber covers and presses'—that is about all. There is just a slight change of verbiage but it is essentially our manufacture and covers the 10 percent which we were assessed. It is the identical statute, in my opinion.

The COURT. The only difference is leaving out tennis rackets?

Mr. GOTTLIEB. Tennis racket frames and strings and one or two others. Everything else has been covered, the vital part as far as our case is concerned.

The COURT. I will receive it."

Regulations 47, revised December, 1920, relating to excise taxes on sales by the manufacturer under section 900 of the Revenue Act of 1918, was thereupon introduced into evidence and marked as "Plaintiff's Exhibit 6".

Thereupon the plaintiff rested.

In behalf of the defendant there was introduced into evidence a certified copy of a letter from David Burnet, Commissioner, to C. S. Hammond & Company, Inc., dated February 7, 1933, which letter was marked as "Defendant's Exhibit A". Thereupon a certified copy of a letter, dated April 20, 1933, from R. M. Estes to C. S. Hammond & Company, Inc. was introduced into evidence and marked "Defendant's Exhibit B". Said letters were then read into the record and read as follows:

DEFENDANT'S EXHIBIT A.

UNITED STATES OF AMERICA.
TREASURY DEPARTMENT.

Washington December 26, 1935

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated February 7, 1933, to C. S. Hammond and Company, Incorporated, Brooklyn, New York, from David Burnet, Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFIELD,
Chief Clerk, Treasury Department.

[SEAL]

WB W W Bamr WWB DAT HO

MT:ST:MR

Feb 7 - 1933

C. S. Hammond & Co., Inc., 360 Furman St., Brooklyn, New York.

Attention: Mr. Chas, H. Bogert, Treas.

Gentlemen: Reference is made to your letter of January 28, 1932, in which information is requested relative to the taxability of jig-saw and picture puzzles under section 609 of the Revenue Act of 1932.

You are advised that this office now holds that jig-saw puzzles, or die cut picture puzzles, containing more than 50 pieces are considered games and subject to the tax imposed by section 609 of the Revenue Act of 1932. Jig-saw puzzles or die cut picture puzzles containing 50 pieces or less are considered children's games and are therefore subject to the exemption allowed under section 609 of the Act.

Due to the fact that in office letter of August 26, 1932, you were notified that jig-saw puzzles were not subject to the tax imposed

under section 609 of the Act, the ruling as stated above will be effective as of the date of this letter. All sales of taxable puzzles made on or after the date of this letter are therefore subject to the tax imposed by section 609 of the Revenue Act of 1932.

Respectfully,

MBC DAVID BURNET, Commissioner.

cc–Brooklyn, N. Y.
cc–Capt. Bliss
N. MD DSB CmE PPB WG.

DEFENDANT'S EXHIBIT B.

UNITED STATES OF AMERICA.
TREASURY DEPARTMENT.

Washington December 26, 1935

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated April 20, 1933, to C. S. Hammond and Company, Incorporated, Brooklyn, New York, from R. M. Estes, Deputy Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFIELD,

[SEAL] Chief Clerk, Treasury Department.

MB WWB amr WWB DAT HO

MT:ST:MR Apr 20 1933

C. S. Hammond & Co., Inc., 358 Furman St., Brooklyn, New York.

Gentlemen: To avoid any possibility of a misunderstanding that might exist among the manufacturers of jig-saw or cardboard die cut picture puzzles as to the taxability of these articles under Section 609 of the Revenue Act of 1932, the following ruling relative thereto has been issued by this office.

Jig-saw or cardboard die cut picture puzzles containing more than 50 pieces are considered games and subject to the tax imposed by Section 609 of the Revenue Act of 1932. Jig-saw or cardboard die cut picture puzzles containing 50 pieces or less are considered children's games and are therefore subject to the exemption allowed under Section 609 of the Act.

The tax is effective on all sales of taxable puzzles made on or after June 21, 1932, by the manufacturer thereof and is based upon the manufacturer's sale price.

Respectfully,

R. M. ESTES,

Deputy Commissioner.

EHG

cc–Brooklyn, N. Y.

cc–Capt. Bliss

MH DSB

Thereupon it was agreed by counsel in open court that the first date when the Commissioner ruled that jig saw puzzles were taxable was November 14, 1932.

During the course of the closing argument by counsel for the plaintiff the following ruling was made by the court:

"Mr. GOROVITZ. In view of the ruling made by your Honor as to the issue of fact, I do not think we need to discuss the law of it at the present time.

The COURT. On the question of passing this tax on I will rule at this time that you did not pass the tax along."

All of the exhibits hereinabove referred to, except such exhibits as are set out in this bill of exceptions, and such as are omitted from the record by stipulation of the parties, appear elsewhere in the record and are expressly incorporated herein and made a part hereof by reference, as if the same were set out herein in full.

The foregoing, together with the exhibits, comprises all the material evidence adduced at the trial of this cause.

Thereafter, on January 14, 1936, the plaintiff filed a motion for a special finding of the facts and a motion for judgment. These motions appear elsewhere in the record of this case and are expressly incorporated herein and made a part hereof by reference.

On the same day the plaintiff submitted requests for rulings of law and findings of fact, to wit:

PLAINTIFF'S REQUESTS FOR RULINGS OF LAW.

Now comes the plaintiff in the above-entitled cause and respectfully moves the court to make the following rulings of law during the progress of the trial:

1. Upon all the evidence the plaintiff is entitled to recover.

2. Upon all the law of this case the plaintiff is entitled to recover.

3. Upon all the law and the evidence the plaintiff is entitled to recover.

4. The provisions of a taxing statute are not to be extended by implication beyond the clear import of its language nor is its operation to be enlarged so as to embrace matters not specifically pointed out. Where doubt exists in construction, that doubt is to be resolved in favor of the taxpayer and that construction is adopted which is most strongly against the claim made by the taxing power and in favor of the citizen.

United States v. *Merriam,* 263 U. S. 179, 187, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240.

Gould v. *Gould,* 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211.

American & La France Fire Engine Co. v. *Riordan,* 6 F. (2d) 164.

Iselin v. *United States,* 270 U. S. 245.

5. The phrase "games and parts of games", as used in Section 609 of the Revenue Act of 1932, is too vague, equivocal, indefinite and ambiguous to include within its application picture puzzles of the type manufactured by The Viking Manufacturing Company, Inc.

6. The phrase "games and parts of games", as used in Section 609 of the Revenue Act of 1932, is to be interpreted with reference to the class of products with which it is associated and since this phrase follows words of particular and specific meaning, it should not be construed in the broader sense, but as applied to products of the same general class as those specifically mentioned.

Phez Co. v. *United States,* 25 F. (2d) 1011.
Virginia v. *Tenn.,* 148 U. S. 519.

7. The meaning of words used in a taxing statute directed at "manufacturers, producers or importers" of certain articles is governed by the language or terminology of the trade or business in which such "manufacturers, producers or importers" are engaged.

8. As Section 609 of the Revenue Act of 1932 is directed at "manufacturers, producers or importers" of "games and parts of games", the last quoted words cannot be construed as including jig saw puzzles and picture puzzles of the jig saw type, because in the terminology of such manufacturers, producers and importers the words "games and parts of games" do not include jig saw puzzles and picture puzzles of the jig saw type.

9. The test to be applied in determining whether or not a jig saw puzzle is a "game" within the meaning of Section 609 of the Revenue Act of 1932 is whether or not a jig saw puzzle is designed or primarily adapted for use as a game.

Universal Battery Co. v. *United States,* 281 U. S. 580.

10. Sales by a manufacturer of jig saw puzzles are not taxable under Section 609 of the Revenue Act of 1932.

11. The picture puzzles of the jig saw type manufactured by The Viking Manufacturing Company, Inc. are not "sporting goods" for "games" within the meaning of Section 609 of the Revenue Act of 1932 and are not subject to tax under said section.

12. Sales by a manufacturer of picture puzzles primarily designed for and adapted to use by children are not taxable under the provisions of Section 609 of the Revenue Act of 1932.

13. The presumption in Article 11 of Regulations 46 relating to excise taxes on sales by the manufacturer under the Revenue Act of 1932, that where no separate charge is made as a tax it will be presumed that the tax is included in the price charged for the article, is arbitrary, unreasonable and confiscatory and violates the Fifth Amendment to the Constitution of the United States.

14. The regulation or ruling of the Commissioner of Internal Revenue that a jig saw puzzle containing more than 50 pieces is sub-

ject to tax as a game under Section 609 of the Revenue Act of 1932, is arbitrary and unreasonable and constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States.

15. Where a taxing statute has been given a definite administrative interpretation for a period of years, upon re-enactment of the statute by Congress substantially without change it will be assumed that the statute was re-enacted with congressional approval of the administrative practice and interpretation.

16. An excise tax on sales by a manufacturer is laid and remains on the manufacturer and on him alone.

Lash's Products Co. v. *United States,* 278 U. S. 175.
Heckman & Co. v. *I. S. Dawes & Son Co.,* 12 F. (2d) 154.

17. The tax on sales imposed on the manufacturer by Section 609 of the Revenue Act of 1932, being a tax on the manufacturer alone, accurately speaking cannot be passed on to the purchaser.

Lash's Products Co. v. *United States,* 278 U. S. 175.

18. Upon all the evidence, The Viking Manufacturing Company, Inc. did not include the tax in the price at which its picture puzzles were sold and did not collect the amount of the tax from the vendee.

19. Section 621 (d) of the Revenue Act of 1932 violates the due process clause of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

SAMUEL GOTTLIEB,
ISRAEL GOROVITZ,
Attorneys for Plaintiff.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

Now comes the plaintiff in the above-entitled cause and respectfully requests the court to find the following facts:

1. The plaintiff is, and was at all times material, a resident of Brookline, County of Norfolk in the Commonwealth of Massachusetts, and a citizen of the United States.

2. The Viking Manufacturing Company, Inc. is a corporation duly

organized under the laws of Massachusetts and formerly having its usual place of business in Boston, County of Suffolk in said Commonwealth.

3. Said corporation was engaged in the business of manufacturing picture puzzles of the jig saw type.

4. On or about September 29, 1934, The Viking Manufacturing Company, Inc. was duly adjudicated a bankrupt upon a voluntary petition filed in this court and thereafter, on October 23, 1934, the plaintiff was appointed its trustee in bankruptcy.

5. The defendant, Thomas W. White, is a resident of Newton, in the County of Middlesex in said Commonwealth, and was, from December 1, 1925 to August 31, 1933, the duly appointed Collector of Internal Revenue of the United States of America for the District of Massachusetts.

6. Pursuant to the provisions of Section 609 of the Revenue Act of 1932 and the regulations issued thereunder, The Viking Manufacturing Company, Inc. duly filed with the defendant its returns of gross monthly sales of the jig saw puzzles manufactured by it covering the period from June 21, 1932 to May 1, 1933, and duly paid thereon to the defendant the total sum of $37,021.63 on the following dates and in the following amounts:

Date.	Amount.
January 30, 1933	$3,075.13
February 16, 1933	259.40
February 27, 1933	6,826.05
March 31, 1933	10,519.50
May 1, 1933	16,341.55
Total	$37,021.63

7. On or about March 16, 1935, the plaintiff duly filed with the Collector of Internal Revenue then in office a claim for refund of the said sum of $37,021.63, setting forth as grounds therefor, among others, the following:

(a) That the jig saw puzzles manufactured by The Viking Manufacturing Company, Inc. were not "sporting goods" or "games" within

the meaning of Section 609 of the Revenue Act of 1932 and were therefore not subject to tax under that section.

(b) That the articles manufactured by it were children's toys or games expressly exempt from taxation under the provisions of said section.

(c) That the regulation or ruling of the Commissioner of Internal Revenue exempting from taxation under Section 609 of the Revenue Act of 1932 only such jig saw puzzles as contained 50 pieces or less is arbitrary, unreasonable and discriminatory in its application to The Viking Manufacturing Company, Inc. and all other manufacturers of jig saw puzzles containing in excess of 50 pieces and that said regulation or ruling constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States.

(d) That Article 11 of Regulations 46 relating to excise taxes on sales by the manufacturer under Sections 602–611, inclusive, 613 and 614 of the Revenue Act of 1932, in providing for a presumption that where no separate charge is made as a tax it will be presumed that the tax is included in the price charged for the article, adopts a presumption which is arbitrary, unreasonable and confiscatory, in violation of the Fifth Amendment to the Constitution of the United States.

(e) That The Viking Manufacturing Company, Inc. at no time included the tax in the price of the article with respect to which it was allegedly imposed under said Section 609 and did not collect the amount of said tax from the vendee.

8. Said claim for refund was disallowed and rejected by the Commissioner of Internal Revenue on May 27, 1935, and the amount therein claimed has never been repaid to the plaintiff.

9. Picture puzzles of the type manufactured by The Viking Manufacturing Company, Inc., or related types, have been known for at least 100 years and have been manfactured for at least 75 years.

10. "Jig saw" puzzles are not "games" within the meaning of Section 609 of the Revenue Act of 1932.

11. "Jig saw" puzzles are not "sporting goods" within the meaning of Section 609 of the Revenue Act of 1932.

12. The picture puzzles manufactured by The Viking Manufac-

turing Company, Inc. were primarily designed for, and adapted to use by children.

13. The picture puzzles manufactured by The Viking Manufacturing Company, Inc. were not adult games.

14. The picture puzzles manufactured by The Viking Manufacturing Company, Inc. contained approximately 162 pieces as a minimum and 500 pieces as a maximum.

15. The Viking Manufacturing Company, Inc. sold practically all of its puzzles on consignment to the American News Company, Inc. under a contract dated November 17, 1932, as extended on December 13, 1932. It made three types of puzzles—a Picture Puzzle Weekly, an Ed Wynn puzzle and a De Luxe puzzle.

16. Under the terms of the contract these puzzles were sold by The Viking Manufacturing Company, Inc. at 12½ cents for the Picture Puzzle Weekly, 17½ cents for the Ed Wynn puzzle and 25 cents for the De Luxe puzzle and it was agreed that these puzzles were to retail at 25 cents, 35 cents and 50 cents, respectively.

17. The Viking Manufacturing Company, Inc. did not know of the existence of a tax on picture puzzles until on or about December 29, 1932, and the contracts which it made with the American News Company, Inc. were executed in ignorance of the existence of any such tax.

18. No allowance was made in these contracts for the inclusion of the tax in the sales price agreed upon therein and at no time did The Viking Manufacturing Company, Inc. include the tax in the price of the puzzles which it sold or collect the amount of the tax from the vendee.

19. The amount of the tax paid by The Viking Manufacturing Company, Inc. was not separately billed or stated in its invoices and no adjustment was made in its price to include the amount of the tax.

20. The taxes paid by The Viking Manufacturing Company, Inc. on sales by it of jig saw puzzles during the months of October 1932 to and including March 1933, were computed on the basis of 10 percent of the price stated in the invoices.

21. In the terminology of the trade, a game is a contest of two

or more people with an element of competition according to a set of rules, where the result is uncertain and there is a winner and a loser.

22. In its common, ordinary and accepted meaning, a game is a contest of two or more people with an element of competition according to a set of rules, where the result is uncertain and there is a winner and a loser.

23. Although the word "game" is sometimes used in common parlance to designate an amusement, pastime, diversion or recreation, in its most common and ordinarily accepted meaning it is used to designate a contest of two or more sides with an element of competition according to a set of rules, where the result is uncertain and there is a winner and a loser.

24. "Toys", "games" and "puzzles" constitute three separate and distinct types or categories of amusement devices, in the terminology of the trade.

25. In their common, ordinary and accepted meaning, "toys", "games" and "puzzles" constitute three separate and distinct types or categories of amusement devices.

26. Children are as adept as adults in solving picture puzzles of more than fifty pieces.

27. Children solved the picture puzzles manufactured by The Viking Manufacturing Company, Inc. with facility equal to that of adults.

28. During the effective period of Section 900 (5) of the Revenue Act of 1918, from February 25, 1919 to December 31, 1921, jig saw puzzles were manufactured and sold and were not taxed by the Commissioner of Internal Revenue.

29. The Commissioner of Internal Revenue ruled on August 26, 1932, that jig saw puzzles were not subject to tax under Section 609 of the Revenue Act of 1932, but on February 7, 1933, he ruled:

> ". . . that this office now holds that jig-saw puzzles, or die cut picture puzzles, containing more than 50 pieces are considered games and subject to the tax imposed by section 609 of the Revenue Act of 1932."

And that:

". . . the ruling as stated above will be effective as of the date of this letter. All sales of taxable puzzles made on or after the date of this letter are therefore subject to the tax imposed by section 609 of the Revenue Act of 1932."

30. On all the evidence it appears that no manufacturers' excise tax with respect to sales of jig saw puzzles was paid to the Collector of Internal Revenue under the provisions of Section 609 of the Revenue Act of 1932 prior to the promulgation of S. T. 567 in November, 1932, although the provisions of the 1932 Revenue Act took effect as of June 21, 1932.

Respectfully submitted,

SAMUEL GOTTLIEB,
ISRAEL GOROVITZ,
Attorneys for Plaintiff.

Thereafter on February 19, 1936, the hearing was resumed and the court, in the presence of counsel for both parties, made the following findings and rulings, to which the plaintiff's exceptions were duly saved, to wit:

"The COURT. In the case of *Aronson* v. *White*, I find for the defendant and file an opinion herewith. Plaintiff's motion for judgment is denied. Defendant's request for rulings of law is granted. Plaintiff's refuests for rulings of law are allowed, in so far as they are consistent with this opinion and denied, in so far as they are inconsistent. Plaintiff's request for findings of fact are similarly allowed, in so far as they are consistent with this opinion. Judgment may be entered for the defendant.

Mr. GOROVITZ. If your Honor please, our exceptions are saved to these rulings?

The COURT. They will be if you ask to have them. Exceptions may be saved and are noted on the record to the disallowance of all requests; I assume that is from the disallowance of all motions and requests.

Mr. GOROVITZ. And as to any requests for findings of fact and rulings of law which you have denied.

The COURT. Yes."

The plaintiff thereupon requested the court to rule specifically on each of the plaintiff's requests for findings of fact and rulings of law, which request was denied, and the plaintiff's exception to the refusal of the court so to do was duly saved.

The plaintiff, being aggrieved by all and singular the adverse decision, orders and rulings of the court as hereinbefore set forth, to which his exceptions were duly saved, presents the foregoing as his bill of exceptions and prays that the same may be allowed and made a part of the record in said cause by this Honorable Court, pursuant to the law and rules of the court in such cases made and provided.

Respectfully submitted,

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

The defendant hereby assents to the allowance of the foregoing as and for the plaintiff's bill of exceptions.

FRANCIS J. W. FORD, *United States Attorney,*
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

The foregoing is allowed as and for the plaintiff's bill of exceptions this fifth day of June, 1936. GEORGE C. SWEENEY,
District Judge.

[MEMORANDUM. Plaintiff's Exhibit 1 is here omitted as it is set out at length on page 20 of the plaintiff's bill of exceptions in this Transcript of Record. JAMES S. ALLEN, *Clerk.*]

PLAINTIFF'S EXHIBIT 3.

AGREEMENT.

We hereby appoint The American News Company, Inc. exclusive agents for supplying

THE PICTURE PUZZLE WEEKLY.

to the trade and agree not to sell any Puzzles to any other person or concern while this agreement is in effect, it being understood that we are to dispose of any accumulated returns to the best possible advantage, but we agree not to dispose of the returns in any way that may interfere with the sale of the current issues of The Picture Puzzle Weekly.

The distribution is to be made on the following terms:

1. A new Puzzle to be issued weekly.
2. Cost to The American News Company, Inc. 12½c. each, f. o. b. the News Company branches in the various cities.
3. Trade price to be 19c.—Retail 25c.
4. Transportation:
   - A. Where shipments are made by The American News Company, Inc. to its branches, it is understood that we are to assume and accept charges for all transportation.
   - B. It is understood also that we are to assume and pay for all transportation on shipments of unsold numbers or returns made by The American News Company, Inc. or its branches to any designated branches for accumulation. And in addition,
   - C. Pay all additional transportation on re-shipments of such accumulated copies, which will be in the nature of new consignments.
   - D. We will also pay The American News Company, Inc. a handling charge on shipments made to their branches, it being understood that such handling charge is included in the transportation and handling rates submitted by them, and hereby accepted by us.
5. It is further agreed that all unsold Puzzles, regardless of their

condition, will be accepted for full credit and transportation paid on the shipments of returns, as outlined in Paragraph 4.

6. We agree to reimbuse The American News Company, Inc. for the cost of distributing our advertising matter, at a rate of not over $4.00 per M. The total cost of distribution to be spread over a three week period; that is, one-third of the cost is to be charged against the payment due us for the first issue, one-third against the second issue and the balance against the third issue.

7. The American News Company, Inc. is to make settlement for the first number after the receipt and distribution to retail dealers of the sixth number, less all accrued charges on the account up to the date of settlement. All subsequent numbers to be settled for on the same basis.

8. In case the Puzzle Weekly is discontinued or the agency relinquished, The American News Company, Inc. is to make such approximate settlement from time to time thereafter as the sales in their judgment may warrant and final settlement four months after the date of notice to dealers to return unsold numbers.

9. In the event of our not taking into our custody all unsold numbers within six months of release date, we authorize The American News Company, Inc. to dispose of all unsold numbers for what they will bring and place the proceeds to our credit.

10. We agree to furnish The American News Company, Inc. a full account in detail of all numbers delivered to them.

11. It is understood that The American News Company, Inc. may relinquish this agency upon giving thirty days notice in writing, except that The American News Company, Inc. may, in its own discretion, terminate this agreement and relinquish the agency at any time with or without prior notice in the event that the Puzzles may be an infringement of patent or copyright, or in any way appear to be a violation of law. It is agreed that The American News Company, Inc. shall not be liable for refusal to carry out the terms of this contract because of such objectionable features.

VIKING MANUFACTURING CO., INC.

November 17, 1932. ROYCE W. GILBERT.

(Copy)

December 13, 1932.

American News Company, 131 Varick Street, New York, N. Y.

Attention: Mr. P. D. O'Connell

Gentlemen: Confirming various telephone conversations relative to your distribution of the remaining first issue of the so-called Ed Wynn Series of picture puzzles, these puzzles are to retail at 35c. each, and are to be billed to you at 17½c. each, we to pay transportation charges, etc. similar to the arrangement on our picture puzzle weekly.

We have on hand some 75,000 to 80,000 of these pictures ready to be cut into puzzles. As soon as this issue is completed it is our intention to close out this series. We would, therefore, request that you keep them on your stands in an attempt to reach as nearly as possible a 100% sale.

Kindly advise us if the above corresponds with your understanding of the arrangement which in all respects other than price is to be governed by our contract with you on the Picture Puzzle Weekly.

Very truly yours,

VIKING MANUFACTURING CO. INC.

LCC:O by:

On the thirteenth day of July, A. D. 1936, a petition for appeal from the aforementioned judgment was filed by the plaintiff and allowed by the court on the same day.

PLAINTIFF'S ASSIGNMENT OF ERRORS.

[Filed July 13, 1936.]

The plaintiff in this action, Philip J. Aronson, as he is trustee in bankruptcy of The Viking Manufacturing Company, Inc., in connection with his petition for appeal, makes the following assignment of errors which he avers occurred in the trial, record and proceedings in this cause in the District Court and in the rendition of the judgment against the plaintiff appearing of record herein:

1. The court erred in denying the plaintiff's motion for judgment.

2. The court erred in granting the defendant's motion for judgment.

3. The court erred in denying the plaintiff's motion for a special finding of the facts.

4. The court erred in denying the plaintiff's requests for findings of fact in so far as they are inconsistent with its opinion rendered herein.

5. The court erred in granting the defendant's request for a ruling of law.

6. The court erred in denying the plaintiff's requests for rulings of law in so far as they are inconsistent with its opinion rendered herein.

7. The court erred in denying the plaintiff's request that it rule specifically on each of the plaintiff's requests for findings of fact and rulings of law.

8. The court erred in denying and refusing to grant each and every request of the plaintiff for a ruling of law, which requests, numbered 1 to 19, both inclusive, appear in the bill of exceptions and are incorporated herein by reference.

9. The court erred in denying and refusing to grant each and every request of the plaintiff for a finding of fact, which requests, numbered 1 to 30, both inclusive, appear in the bill of exceptions and are incorporated herein by reference.

10. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

> "*Q.* From your knowledge and experience in the trade, would you say that a ruling that all jig saw puzzles having 50 pieces or less are children's games, and all jig saw puzzles having more than 50 pieces are adult games,—would you say that ruling is a reasonable one as a matter of fact?"

11. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

> "*Q.* When information first came to your knowledge of this

tax under the Revenue Act of 1932, were you of the opinion that the word 'games' comprehended and included jig saw puzzles?"

12. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Did you as a manufacturer of jig saw puzzles make any monthly reports as required by law?"

13. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Do you remember when Parker Bros. first made its return to the Collector of Internal Revenue on jig saw puzzles as games?"

14. The court erred in ruling that it did not care how the trade felt about the meaning of the word "games".

15. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Did Parker Bros. manufacture cross word puzzles in 1932 and 1933?"

16. The court erred in striking out the answer of the witness George S. Parker to the following question on direct examination:

"*Q.* Did your company pay any taxes on jig saw puzzles as games during the years 1919, 1920 and 1921?"

17. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Do you know whether the trade generally paid any taxes during 1919, 1920 and 1921 on jig saw puzzles?"

18. The court erred in admitting the testimony of George S. Parker, on cross-examination, as to how many players a ouija board has.

19. The court erred in admitting the testimony of Forrest R. Cook, on cross-examination, as to whether or not he considers a ouija board a game.

20. The court erred in admitting the testimony of Forrest R. Cook, on cross-examination, as to whether or not he considers a penny or nickel-in-the-slot machine a game.

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

A bond on appeal in the sum of two hundred fifty dollars ($250) was filed by the plaintiff on the thirteenth day of July, A. D. 1936, the Fidelity and Deposit Company of Maryland acting as surety. Said bond on appeal was approved by the court on the same day.

A citation on appeal was issued on the thirteenth day of July, A. D. 1936, being made returnable in the United States Circuit Court of Appeals on the twelfth day of August, A. D. 1936.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the plaintiff, including true copies of such proofs, entries and papers on file as have been agreed upon, in the cause entitled,

No. 6463, Law Docket,

PHILIP J. ARONSON, Trustee in Bankruptcy of
THE VIKING MANUFACTURING COMPANY, Inc., Plaintiff,

v.

THOMAS W. WHITE, Individually, and as Former Collector of Internal Revenue, Defendant.

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal, the bond on appeal, and the citation on appeal with the acknowledgment of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this tenth day of August, A. D. 1936.

[SEAL] JAMES S. ALLEN, *Clerk.*

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On October 16 and 20, 1936, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the fifth day of January, A. D. 1937, the following Opinion of the Court was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3171. October Term, 1936

PHILIP J. ARONSON, TRUSTEE, PLAINTIFF, APPELLANT

v.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the Court

January 5, 1937

BINGHAM, J.: Philip J. Aronson, trustee in bankruptcy of the Viking Manufacturing Company, Inc., brought this action at law, in the federal District Court for Massachusetts, against Thomas W. White, individually and as former Collector of Internal Revenue, to recover $37,021.61, paid on or before April 30, 1933, as taxes assessed on jig saw picture puzzles manufactured and sold by the Viking Company. The case was tried by the court, a jury being waived in writing, who found for the defendant and entered judgment, from which the plaintiff appealed.

The taxes were assessed under Section 609 of the Revenue Act of 1932 (47 Stat. 264), which reads as follows:

"Sec. 609. Tax on Sporting Goods.

"There is hereby imposed upon the following *articles*, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: *Tennis rackets*, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, *polo* mallets, *baseball* bats, gloves, masks, protectors, shoes and uniforms, *football* helmets, harness and uniforms, *basket ball* goals and uniforms, *golf* bags and clubs, *lacrosse* sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, *billiard* and *pool tables*, *chess* and *checker* boards and pieces, *dice*, *games and parts of games* (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods." [Italics supplied.]

The defendant takes the position that a jig saw picture puzzle is a game within the meaning of that word as used in the above section and falls within its broad definition of "an amusement or diversion." Webster's New International Dictionary.

The plaintiff contends, on the other hand, for a more restricted definition; that the word "game" means "a contest, physical or mental, according to certain rules, for amusement, recreation, or for winning a stake" (Webster's New International Dictionary), requiring the participation of two or more persons; that a jig saw picture puzzle does not come within its terms, and is designed for use by one person and without competition or rules.

The parties concede that the phrase "games and parts of games" mean the articles or instrumentalities used in games and in parts of games, and that it is these articles or instrumentalities the sale of which was to be taxed. It is under this description (games and parts of games) that the jig saw picture puzzles here in question were held taxable by the court below, the theory being that the putting together of a jig saw picture puzzle was an amusement or diversion and, therefore, a game, although it involved no competition and only one participant.

It must also be conceded that, as generally understood, a game involves a sport or diversion in which two or more persons contest, and we think the meaning of the word "game" in the phrase here under consideration, when taken in connection with the other matters stated in Section 609, means the same.

The section is headed "Tax on Sporting Goods." The articles or instrumentalities there specifically named are sporting goods whether they are used in connection with games or in some recreation or diversion other than a game. But the larger portion of the articles specifically named are all used in games of contest between two or more persons, and the question of construction is whether the articles or instrumentalities intended to be covered by the phrase "games and parts of games" mean articles or instrumentalities used in games of contest like the specific articles previously named in the section, which are used in games of tennis, polo, baseball, etc., all of which involve a contest.

We think this question requires an affirmative answer and that the words "games and parts of games" bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are and with which they are closely associated. United States v. Stever, 222 U. S. 167, 174: Casey v. Sterling Cider Co., 294 Fed. 426; Monroe Cider, Vinegar & Fruit Co. v. Riordon, 280 Fed. 624; United States v. Phez Co., 28 Fed. (2d) 106; Hill v. Joseph, 229 Fed. 865; United States v. Florida East Coast R. Co., 222 Fed. 33; United States v. Baumgartner, 259 Fed. 722; 25 R. C. L. 997.

Furthermore the particular article here sought to be taxed is a puzzle. A puzzle is defined as "something which perplexes or embarrasses; a difficult problem or question; hence a toy, contrivance, question or problem designed for testing ingenuity; as a cross word puzzle." Webster's New International Dictionary. A jig saw picture puzzle comes squarely within this definition—"a contrivance . . . designed for testing ingenuity." None of the articles specifically named in the statute and used in games is a contrivance designed for testing ingenuity. They are designed for use in games of contest, while a jig saw puzzle is not.

We recognize that in Baltimore Talking Board Co. v. Miles, 280 Fed. 658, the Ouija Board case, involving Section 900 (5) of the Revenue Act of 1918, which is substantially the same as Section 609 of the Revenue Act of 1932,[1] it was held that an article or instrumentality "not reasonably necessary to comfort according to the average standards of American life" (luxuries) were taxable, if used for "amusement and diversion", on the ground that

[1] The only differences being that the latter act added the phrase "tennis racket frames and strings", omitted the word "cushions" after "canoe paddles", substituted "uniforms" for "goals" after the words "football helmets, harness and", and in the last clause, between the words "commonly" and "commercially" substituted the word "or" for "and."

any article of such a character, if so used, was a game within the meaning of the section. But we think that construction was too broad; that what was meant by the word "games" was restricted to the character of the games previously alluded to in the section, which are all games of contest.

The other articles specifically mentioned in the section and preceding the phrase in question, such as skates, snow shoes, skis, canoe paddles, fishing rods and reels, have no relation to games and afford no means for the ascertainment of the meaning of the phrase "games and parts of games." They are unquestionably sporting goods.

No well settled construction had been placed on Section 900 (5) of the Revenue Act of 1918 (which was repealed by the Revenue Act of 1921), prior to the enactment of Section 609 of the Revenue Act of 1932; for in Mills Novelty Co. v. United States, 50 Fed. (2d) 476, the article or instrumentality there in question was found to be used in a game of contest, in which at least two persons engaged.

Then again a jig saw puzzle was never taxed under Section 900 (5) of the Act of 1918. It was not taxed until after the passage of Section 609 of the Revenue Act of 1932, when the government attempted to tax it as a game. The Act of 1932 became effective June 6, 1932. On August 26, 1932, the Commissioner issued a ruling stating that jig saw or die cut picture puzzles were not taxable. On November 14, 1932, he issued a ruling that they were taxable. On February 7, 1933, he ruled that after February 7, 1933, they were taxable if they contained more than fifty pieces. And on April 20, 1933, he ruled that they were taxable after June 21, 1932, if they contained more than fifty pieces. All of which goes to show that the Internal Revenue Department had little, if any, idea whether a jig saw picture puzzle was an article or instrumentality taxable as a game under the phrase "games and parts of games," particularly when it is said that such a picture puzzle, if it contained more than fifty pieces, was taxable as a game and if it contained fifty pieces or less it was not.

If there is a reasonable doubt as to the meaning of the act, it should be construed most favorably to the taxpayer. *Gould* v. *Gould*, 245 U. S. 151. But we see no reason for resorting to that expedient here.

The judgment of the District Court is vacated and the case is remanded to that court with directions to enter judgment for the plaintiff, with costs in both courts.

On the same day, to wit, January 5, 1937, the following Judgment was entered:

Judgment

January 5, 1937

This cause came on to be heard October 16 and 20, 1936, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 5, 1937, here ordered, adjudged, and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that court with directions to enter judgment for the plaintiff, with costs in both courts.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on February 8, 1937, mandate issued.

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 63, inclusive, contain and are a true copy of the record and all proceedings to and including March 26, 1937, in the cause in said court numbered and entitled,

No. 3171

PHILIP J. ARONSON, TRUSTEE, PLAINTIFF, APPELLANT

v.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT, APPELLEE

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-sixth day of March, A. D. 1937.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed May 3, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

PETITION FOR A WRIT OF CERTIORARI

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Case:	
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135922—37

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

PHILIP J. ARONSON, TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Thomas W. White, individually and as former Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on January 5, 1937.

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Massachusetts (R. 10–14) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals is reported in 87 F. (2d) 272.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the term "games and parts of games" as used in Section 609 of the Revenue Act of 1932 should be construed as applying only to articles used in games of contest between two or more people.

2. Whether in view of substantial evidence in the record tending to show that jig saw puzzles are adapted to, and widely used in, competitive play, the court below was correct in reversing the trial court's general finding for the petitioner and in directing the entry of a judgment for the respondent.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 609. TAX ON SPORTING GOODS.
>
> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, foot-

ball helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods. (U. S. C., Title 26, c. 20B, p. 1186.)

STATEMENT

This is an action at law brought in the District Court for the District of Massachusetts by the respondent herein against the petitioner herein, for the recovery of excise taxes on certain articles, known as jig saw puzzles, manufactured by the respondent, which taxes were assessed and collected under Section 609 of the Revenue Act of 1932 (R. 1–6). Trial by jury was duly waived and the case was tried to the court (R. 7). The court made a general finding for the petitioner, and judgment was entered in his favor (R. 8–10). An appeal from that judgment was taken by the respondent to the Circuit Court of Appeals for the First Circuit, which reversed the judgment of the District Court.

The evidence in the case consisted of oral testimony and certain exhibits offered and received in evidence (R. 15–41, 51–52, 53), including seven

samples of the articles manufactured and sold (R. 25).

The articles in question were all manufactured in the same way; that is, various pictures were selected and backed up with heavier cardboard and then cut by steel dies on a power press (R. 25) into a minimum of 162 pieces and a maximum of 500 pieces (R. 27). In designing and manufacturing the articles, the taxpayer did not limit itself to an appeal to children, but made the articles generally for whoever would buy them (R. 26). In determining the number of pieces into which the pictures were cut, the taxpayer was guided by the requirements of the purchasing public (R. 27). The samples of the articles transmitted to the court below and to this Court as an original exhibit, indicate that what the purchasing public received was a picture backed by thick cardboard that had been cut into pieces in an irregular manner and the pieces mixed up and enclosed in a container (R. 9, Ex. 2). The purchasers of the articles did not receive with the purchase a facsimile of the picture that had been cut up into pieces (R. 9, Ex. 2). The articles suggest to a person seeking pastime or diversion a two-fold effort: first to put the pieces together so as to show a complete picture; second, to show the completed picture in the shortest possible time. During the time covered by the tax assessments, thousands of people from different parts of the country wrote to the taxpayer advising it of the time it took these people to assemble the

pictures (R. 30). During the time the so-called picture puzzle craze was at its height, neighbors and friends met together and assembled these cut pictures (R. 30). The relative time required to put together the cut pictures created competition (R. 31).

The amount sought to be recovered in the action was the sum of $37,021.63, with interest (R. 5–6), and the Circuit Court of Appeals remanded the case to the District Court with directions to enter judgment for respondent with costs in both courts.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the term "games and parts of games" as used in Section 609 of the Revenue Act of 1932 is limited to sports or diversions in which two or more persons contest.

2. In reversing the trial court's general finding for the petitioner, there being substantial evidence in the record to support such finding even under the appellate court's definition of the word "game."

3. In remanding the case with directions to enter judgment for the respondent.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals as to the meaning of the words "games and parts of games" as used in Section 609 of the Revenue Act of 1932 is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit on the

same matter in the case of *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, certiorari denied, 259 U. S. 587.

In the case of *Baltimore Talking Board Co.* v. *Miles, supra,* the articles taxed were known as ouija boards, being articles made entirely of cardboard and paper. Regarding their purposes and uses, the court stated that the ouija board is seriously used by some persons in the belief that it affords mysterious spirit communication and by others as a means of personal observation of the control of muscular or nervous action, but that it was "largely sold with the expectation that it is to be used merely as a means of social amusement or play, and is actually so used."

The court, in holding the ouija boards to be "games" within the meaning of the revenue statute, stated (p. 661):

> The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life. * * *
>
> On the whole the conclusion seems fair that the present chief purpose of the Ouija board is to supply amusement and diversion, and that it should be held to fall under the comprehensive term "games," within the meaning of the statute.

As shown above, the purposes and uses of the articles in the instant case present the element of contest more than did the ouija boards.

In the instant case, however, the Circuit Court of Appeals in holding that the articles known as jig saw puzzles are not "games" within the meaning of the revenue statute, referred to the case of *Baltimore Talking Board Co.* v. *Miles, supra,* and stated (p. 274):

> We recognize that in *Baltimore Talking Board Co.* v. *Miles* (C. C. A.) 280 F. 658, 661, the Ouija Board Case, involving section 900 (5) of the Revenue Act of 1918 (40 Stat. 1122), which is substantially the same as section 609 of the Revenue Act of 1932,[1] it was held that an article or instrumentality "not reasonably necessary to comfort according to the average standards of American life" (luxuries) were taxable, if used for "amusement and diversion," on the ground that any article of such a character, if so used, was a game within the meaning of the section. But we think that construction was too broad; that what was meant by the word "games" was restricted to the character of the games previously alluded to in the section, which are all games of contest.

[1] The only differences being that the latter Act added the phrase "tennis racket frames and strings", omitted the word "cushions" after "canoe paddles", substituted "uniforms" for "goals" after the words "football helmets, harness and", and in the last clause, between the words "commonly" and "commercially" substituted the word "or" for "and."

CONCLUSION

The construction placed upon the statute by the court below so restricts the operation of the taxing Act that it casts doubt upon the application of the statute. The conflict should be resolved in the interests of efficient administration to the end that the Treasury and the industry may be definitely advised of the scope of the statute. It is therefore respectfully submitted that this petition for writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

APRIL 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937